02-9410

No. 02-____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

MAR 10 2003

MICHAEL D. CRAWFORD,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Washington

PETITION FOR A WRIT OF CERTIORARI

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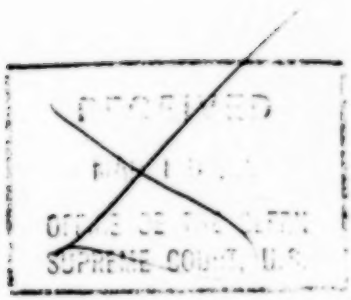

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ORIGINAL

QUESTIONS PRESENTED

I. Whether the Confrontation Clause of the Sixth Amendment permits the admission against a criminal defendant of a custodial statement by a potential accomplice on the ground that parts of the statement "interlock" with the defendant's custodial statement.

II. Whether this Court should reevaluate Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

I. This Court Should Resolve the Split of Authority Regarding Whether a Potential Accomplice's Custodial Confession Is Admissible Against a Criminal Defendant on the Basis That It "Interlocks" With a Custodial Statement By the Defendant. 6

A. State and Federal Courts, Including Several of the States' Highest Courts, Are Divided on this Issue. 6

B. The Washington Supreme Court's Holding Contravenes This Court's Precedent. 10

C. This Case is an Excellent Vehicle for Considering This Issue. 12

II. This Court Should Grant Certiorari To Reexmine the Confrontation Clause Framework Established in *Ohio v. Roberts* and To Hold That Out-of-Court "Testimonial" Statements Offered Against a Defendant Are Per Se Inadmissible. 14

A. Justices of This Court, Leading Scholars, and the United States Solicitor General All Recently Have Urged This Court to Reexamine the *Ohio v. Roberts* Framework. 14

B. The Need for a Reexamination of the *Roberts* Framework Is Pressing Because It Regularly Allows the Admission of Extrajudicial Statements That Implicate the Core Concerns of the Confrontation Clause. 17

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Bass v. Commonwealth, 523 S.E.2d 534 (Va. App. 2000) 8

Cruz v. New York, 481 U.S. 186 (1987) 6, 8, 10, 11, 13

Franqui v. State, 699 So. 2d 1312 (Fla. 1997) 9

Government of the Virgin Islands v. Joseph, 964 F.2d 1380 (3rd Cir. 1992) 10

Idaho v. Wright, 497 U.S. 805 (1990) ..... passim

Lee v. Illinois, 476 U.S. 530 (1986) 6, 7, 8, 11

Lilly v. Commonwealth, 499 S.E.2d 522 (Va. 1998) 11

Lilly v. Virginia, 527 U.S. 116 (1999) ..... passim

Marks v. United States, 430 U.S. 188 (1977) 19

Miller v. Miller, 784 F. Supp. 390 (E.D. Mich.), *aff'd* 983 F.2d 1067 (6th Cir. 1992) 9

Ohio v. Roberts, 448 U.S. 56 (1980) ..... passim

People v. Beasley, 609 N.W.2d 581 (Mich. App. 2000) 19

People v. Campbell, 721 N.E.2d 1225 (Ill. App. 1999) 18

People v. Farrell, 34 P.3d 401 (Colo. 2001) 8, 17

People v. Lawrence, 55 P.3d 155 (Colo. App. 2001) 18

People v. Schutte, 613 N.W.2d 370 (Mich. App. 2000) 18

People v. Thomas, 730 N.E. 618 (Ill. App. 2000) 18

People v. Watkins, 475 N.W.2d 727 (Mich. 1991) 8, 13

Rankins v. Commonwealth, 523 S.E.2d 524 (Va. App. 2000) 8, 19

Simmons v. State, 636 A.2d 463 (Md. 1994) 9

State v. Bintz, 650 N.W.2d 913 (Wis. App.), *review denied*, 653 N.W.2d 891 (Wis. 2002) 18, 19

State v. C.J., ___ P.3d ___, 2003 WL 252147 (Wash. Feb. 6, 2003) 20

State v. Hawkins, ___ N.E.2d ___, 2002 Ohio App. LEXIS 7208 (Ohio App. Dec. 31, 2002) 18, 20

State v. Harris, 739 So. 2d 312 (La. App. 1999) 9

State v. Jones, 15 P.3d 616 (Or. App. 2000) 18, 19

State v. Marshall, 737 N.E.2d 1005 (Ohio App. 2000) 18, 20

State v. McNeill, 537 S.E.2d 518 (N.C. App. 2000) 19

State v. Rice, 844 P.2d 416 (1993) 3, 7, 10, 13

State v. Sanchez, 797 P.2d 703 (Ariz. App. 1990) 8

State v. Sonthinkoummane, 769 A.2d 330 (N.H. 2000) 18

State v. St. Pierre, 759 P.2d 383 (1988) 7

Stevens v. People, 29 P.3d 305 (Colo. 2001) 17, 19

Stribling v. Smith, 2000 WL. 796181 (E.D. Mich. 2000) 19

Taylor v. Commonwealth, 63 S.W.3d 151 (Ky. 2001) 18

United States v. Aguilar, 295 F.3d 1018 (9th Cir. 2002) 18, 20

United States v. Castelan, 219 F.3d 690 (7th Cir. 2000) 18, 20

United States v. Centracchio, 257 F.3d 518 (7th Cir. 2001) 18

United States v. Dolah, 245 F.3d 98 (2d Cir. 2001) 18

United States v. Gallego, 191 F.3d 156 (2d Cir. 1999) 19

United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999) 19

United States v. Gomez-Lemos, 939 F.2d 326 (6th Cir. 1991) 9

United States v. Hansen, 36 M.J. 599 (U.S.A.F. 1992) 8

United States v. Moskowitz, 215 F.3d 265 (2d Cir. 2000) 19

United States v. Papajohn, 212 F.3d 1112 (8th Cir. 2000) 19

United States v. Petrillo, 237 F.3d 119 (2d Cir. 2000) 18

United States v. Photogrammetric Data Services, Inc., 259 F.3d 229 (4th Cir. 2001), *cert. denied*, 535 U.S. 926 (2002) 17

United States v. Thomas, 2002 WL 429383 (4th Cir. 2002) 19

White v. Illinois, 502 U.S. 346 (1992) 14, 15, 17

Wilson v. State, 639 A.2d 125 (Md. 1994) 13

COURT FILING

Brief *Amicus Curiae* for ACLU in *Lilly v. Virginia*, 527 U.S. 116 (1999) 15

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael D. Crawford petitions for a writ of certiorari to review the judgment of the Washington Supreme Court decision in this case.

OPINIONS BELOW

The opinion of the Washington Supreme Court (Pet. App. 1a-9a) is published at *State v. Crawford*, No. 54 P.3d 656 (Wash. 2002). The opinion of the Washington Court of Appeals (Pet. App. 10a-16a) was unpublished but is reported at 107 Wn. App. 1025 and 2001 WL 850119 (Wash. App. 2001).

JURISDICTION

The Washington Supreme Court issued its decision in this case on September 26, 2002, and denied Petitioner's timely petition for rehearing on December 12, 2002 (App. 17a). This Court has jurisdiction under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

This c[illegible], which involves the admission of a tape-recorded custodial statement by a potential acc[illegible]plice against a criminal defendant, raises a Confrontation Clause issue that has divided the state and federal courts and presents this Court with an opportunity to reexamine the Clause to bring it back in line with its historical and textual underpinnings.

1. On August 5, 1999, Petitioner Michael D. Crawford and his wife Sylvia, at Sylvia's urging, went to the apartment Rubin Richard Kenneth Lee. An argument ensued, and Petitioner eventually stabbed Lee and injured him. Petitioner received a cut on his hand.

That night, the police questioned both Petitioner and Sylvia at the police station. Each gave two separate statements, all of which the police tape-recorded. Both of Petitioner's and Sylvia's first statements contained similar and general stories: Petitioner briefly left Lee's apartment; he returned to find Lee making sexual advances toward Sylvia; and Lee was stabbed. Several hours later, Petitioner and Sylvia gave their second, more detailed statements. They said that Lee actually had sexually assaulted Sylvia several weeks earlier. This time, however, the statements differed from each other somewhat. "[T]he main distinguishing factor in these second statements was that [Petitioner] alluded that Lee may have had something in his hand *when* [Petitioner] stabbed Lee, while Sylvia implied that Lee may have grabbed for something *after* [Petitioner] stabbed Lee." App. 3a (emphasis added). (The full text of the relevant portions of these statements is reproduced at App. 14a n.2.) Sylvia also added that Petitioner had been "infuriated," "enraged," and "past tipsy," and she stated that Petitioner had said before the incident that Lee "deserves an ass whoopin'." App. 12a.

The State filed an information against Petitioner for first degree assault with a deadly weapon. Although Sylvia was a "potential accomplice" because she "showed [Petitioner] where to find Lee[,] was present through the duration of the violent encounter, . . . walked away from the stabbing with [Petitioner] and did not turn to the police when she had the opportunity," App. 7a, the State declined to press charges against her.

The key issue at Petitioner's trial was whether he acted in self-defense. Petitioner invoked Washington's marital privilege statute to prevent Sylvia from testifying. The State, however, offered, and the trial court admitted, Sylvia's second statement as evidence that Lee reached for a weapon only *after* Petitioner stabbed him. The State also introduced Sylvia's first statement to argue that Petitioner and Sylvia initially lied about the circumstances that led up to the stabbing. App. 11a. The jury found Petitioner guilty, and on November 19, 1999, the court sentenced him to 150 months in prison.

2. On appeal, the Washington Court of Appeals reversed Petitioner's conviction on the ground that the admission of Sylvia's statements violated the Confrontation Clause. Applying a nine-part test "to determine whether an out-of-court statement satisfies the reliability prong of" this Court's interpretation of the Confrontation Clause in *Ohio v. Roberts*, 448 U.S. 56 (1980), the court of appeals held that Sylvia's second statement was "plainly untrustworthy," App. 15a, because: Sylvia had a motive to lie; Sylvia's giving two different versions of her statement within four hours "does not suggest truthfulness"; Sylvia's statement was not spontaneous, but rather was given under mandatory police questioning; the statement described past events; and "cross-examination could reveal that she lacked knowledge of what happened" because "Sylvia stated that she shut her eyes during the stabbing." App. 13a. The court of appeals added that although the Washington Supreme Court held in *State v. Rice*, 844 P.2d 416 (1993), that an accomplice's confession could be deemed reliable if it "interlocked" with the defendant's confession, "that reasoning does not apply in this case" because Petitioner's and Sylvia's statements "differ regarding whether Lee was armed when [Petitioner] stabbed him." App. 14a. Finally, the court of appeals held that this Court's decision in *Lilly v. Virginia*, 527 U.S. 116 (1999), "is on point in this case" and requires the exclusion of Sylvia's statement because that case, like this one, involved custodial statements by a non-testifying accomplice that incriminated the defendant. App. 15a.

The court of appeals next held that Sylvia's first statement was erroneously admitted because, as evidence of supposed fabrication, "it is relevant only if the second statement is admitted." App. 11a, 15a. Lastly, the court of appeals concluded that the admission of Sylvia's statements was not harmless because "Sylvia's second statement refutes [Petitioner's] claim of self-defense" and sends the "overwhelming message that the jury cannot trust [Petitioner's story]." App. 15a.

Chief Judge Armstrong dissented. He argued that Sylvia's second statement was admissible because it "interlocked" with Petitioner's statements. In the dissent's view,

"even if we read Sylvia's statement as reporting that Lee reached for something after the stabbing, the statements are still the same in one essential fact: neither [Petitioner] nor Sylvia clearly stated that Lee had a weapon in hand from which [Petitioner] was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." App. 16a.

3. The Washington Supreme Court granted the State's petition for discretionary review, reversed and reinstated Petition's conviction. After confirming that the declarant in this case was "unavailable" to testify as a matter of state law, the Court stated that out-of-court statements offered against a criminal defendant are admissible under the Confrontation Clause if they have "particularized guarantees of trustworthiness" or if they "interlock" with the defendant's statements to the police. App. 6a. Without addressing the "particularized guarantees" test or the *Lilly* decision, the Court adopted the reasoning from the dissent in the court of appeals and held that Sylvia's second statement was admissible solely because it "appear[ed] to overlap," or "interlocked," with Petitioner's custodial statement. App. 8a. Because both statements "are ambiguous as to whether Lee ever actually possessed a weapon," the Court concluded that the "admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause." App. 9a.

4. Petitioner timely sought rehearing of this decision, but the Supreme Court denied this motion without comment. App. 17a.

REASONS FOR GRANTING THE WRIT

1. State and federal courts, including states' highest courts, are divided six-to-four concerning whether a potential accomplice's custodial statement is admissible against a criminal defendant on the basis that parts of it "interlock" with a custodial statement by the defendant. This Court should review the Washington Supreme Court's decision in this case – which holds that the Confrontation Clause allows accomplices' custodial statements to be admissible on this basis – to resolve this conflict because the admissibility of such evidence is a critical issue in criminal trials across the Nation and the Washington Supreme Court's rule is incorrect.

2. Indeed, the split of authority concerning interlocking custodial statements is endemic of the need to reexamine the Confrontation Clause in a more fundamental manner. Several of this Court's Justices, as well as leading scholars and the Solicitor General of the United States, recently have urged this Court to reevaluate the framework established in *Ohio v. Roberts,* 448 U.S. 56 (1980), which links the Confrontation Clause with ordinary hearsay law and makes any extrajudicial statement admissible if it falls within a firmly rooted hearsay exception or a court determines that it has "particularized guarantees of trustworthiness." *Id.* at 65. This Court should undertake such an evaluation here and hold, in accordance with these Justices' suggestions, that the Confrontation Clause erects a per se rule that out-of-court statements that are contained in "testimonial" materials, such as tape-recorded custodial confessions, are inadmissible against criminal defendants. This modification would not require this Court to overrule any of its prior holdings, but it would greatly simplify applications of the Confrontation Clause, deconstitutionalize hearsay law, and bring the Confrontation Clause back in line with its textual and historical underpinnings.

I. THIS COURT SHOULD RESOLVE THE SPLIT OF AUTHORITY REGARDING WHETHER A POTENTIAL ACCOMPLICE'S CUSTODIAL CONFESSION IS ADMISSIBLE AGAINST A CRIMINAL DEFENDANT ON THE BASIS THAT IT "INTERLOCKS" WITH A CUSTODIAL STATEMENT BY THE DEFENDANT.

A. State and Federal Courts, Including Several of the States' Highest Courts, Are Divided on this Issue.

Under the framework that this Court has established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny, an out-of-court statement may be admitted into evidence against the accused, consistent with the Confrontation Clause, only if (i) the statement falls within a firmly rooted hearsay exception or (ii) "particularized guarantees of trustworthiness" establish that the statement is otherwise sufficiently reliable that cross-examination would be of marginal utility. *Id.* at 65; *accord Lilly v. Virginia*, 527 U.S. 116, 124-25 (1999) (plurality opinion). In *Lee v. Illinois*, 476 U.S. 530 (1986), this Court held that the Confrontation Clause barred the admission of out of court statement very much like the one at issue here – a custodial confession by an accomplice that incriminated the defendant – because the statement neither fell within a firmly rooted hearsay exception nor contained particularized guarantees of trustworthiness. In analyzing the latter issue, this Court "reject[ed]" the state's argument that the accomplice's custodial statement was trustworthy because it "'interlock[ed]' on some points" with the defendant's confession, but it noted that an accomplice's statement that "thoroughly" interlocked with a defendant's might contain sufficient guarantees of trustworthiness to allow its admission at trail. *Id.* at 545-46. In *Cruz v. New York*, 481 U.S. 186 (1987), this Court similarly held that an accomplice's interlocking confession was not admissible in a joint trial involving the accomplice, who refused to testify, and another defendant. But, citing *Lee*, this Court left open the possibility that evidence of interlock "may be relevant" to a Confrontation Clause reliability inquiry under other circumstances. *Id.* at 192-93.

Three years later, in *Idaho v. Wright*, 497 U.S. 805 (1990), this Court again addressed the "particularized guarantees" prong of confrontation law. Ruling that an out-

of-court statement by an alleged victim of child abuse was inadmissible, this Court rejected the state's argument that evidence that corroborated the declarant's statement was relevant to the "particularized guarantees" inquiry. This Court explained:

> [T]he relevant circumstances include *only* those that surround the making of the statement and that render the declarant particularly worthy of belief. . . .
>
> . . . .
>
> [H]earsay evidence used to convict a defendant must possess indicia of reliability *by virtue of its inherent trustworthiness, not by reference to other evidence at trial.*

Id. at 819, 822 (emphasis added). This Court added that "although we considered in *Lee v. Illinois* the 'interlocking' nature of a codefendant's and a defendant's confessions to determine whether the codefendant's confession was sufficiently trustworthy for confrontation purposes, we declined to rely on corroborative physical evidence and indeed rejected the 'interlock' theory in that case." *Id.* at 824.

Since the *Wright* decision, state and federal courts, including states' highest courts, have split regarding whether an accomplice's custodial confession may satisfy the Confrontation Clause's "particularized guarantees" inquiry on the basis that it "interlocks" with the defendant's custodial statement. In this case, the Washington Supreme Court reaffirmed its earlier decisions in *State v. Rice*, 844 P.2d 416 (1993), and *State v. St. Pierre*, 759 P.2d 383 (1988), which held that an accomplice's confession satisfies *Roberts*' "particularized guarantees" test when it "interlock[s] with the defendant's own confession." App. 8a. In *Rice*, the Washington Supreme Court "admitted[] that the United States Supreme Court in *Wright* has indicated that corroborating evidence generally is not relevant for the trustworthiness inquiry." 844 P.2d at 427 n.5. But the Washington Supreme Court nonetheless surmised that this Court in *Wright* "did not reject interlocking confessions as a basis for establishing reliability. . . . It appears to have only rejected the use of corroborating *physical* evidence to establish reliability." *Id.* (internal citation omitted).

Courts in three other jurisdictions have reached the same conclusion as the Washington Supreme Court – *i.e.*, that "a defendant's interlocking confession, where one exists, may appropriately be considered in assessing the reliability of the accomplice's statement." *Rankins v. Commonwealth*, 523 S.E.2d 524, 531 & n.8 (Va. App. 2000); *see also Bass v. Commonwealth*, 523 S.E.2d 534, 540 (Va. App. 2000) ("[T]he Supreme Court in *Wright* did not reject the use of the interlocking character of codefendant confessions as probative of their reliability, but merely declined to rely on the use of corroborative physical evidence in applying *Lee*'s analysis.") (internal quotation marks omitted); *United States v. Hansen*, 36 M.J. 599, 607 (U.S.A.F. 1992) ("[W]e do not believe *Wright* precludes, in all cases, looking to an accused's confession or admissions when assessing the reliability of a hearsay statement"; "[w]e do not believe [trial court] committed error" in admitting accomplice confession on basis that it "interlock[ed] with defendant's admission to investigators."); *State v. Sanchez*, 797 P.2d 703, 707 (Ariz. App. 1990) (particularized guarantees inquiry "includes the other defendants' statements and the extent to which they 'interlock' with the confessions of the [defendants] they are offered against").

In contrast, six other courts – including the Supreme Courts of Colorado, Florida, and Michigan, and the Maryland Court of Appeals (the highest court in Maryland) – have reached the directly opposite conclusion as the Washington Supreme Court did in this case. The Michigan Supreme Court, for example, has held that "*Wright* specifically rejected reliance on either corroborative physical evidence, hearsay statements, or trial testimony, . . . and thus clearly overruled the dicta in both *Lee* and *Cruz* regarding reliance on the 'interlocking' consistency or corroboration of confessions." *People v. Watkins*, 475 N.W.2d 727, 746 (Mich. 1991). The other states' highest courts have employed similar reasoning, as have other state and federal courts. *See People v. Farrell*, 34 P.3d 401, 406 (Colo. 2001) (refusing to consider whether "Defendant's interlocking statements" established reliability of accomplice's confession because "[i]n deciding

whether [such a statement] bears the particularized guarantees of trustworthiness necessary to justify its admission," the statement must "possess indicia of reliability based on inherent trustworthiness, not based on other evidence at trial"); *Franqui v. State*, 699 So.2d 1312, 1319 (Fla. 1997) ("[T]he bottom line of *Wright* is that the interlocking nature of the confessions cannot provide a basis upon which to determine whether there are sufficient indicia of reliability to introduce and codefendant's hearsay confession as substantive evidence of the defendant's guilt."); *Simmons v. State*, 636 A.2d 463, 469-70 (Md. 1994) (While "it was once thought that . . . [t]he interlocking nature or meshing of the codefendant's and defendant's statements could be considered in determining whether the hearsay statement enjoyed particularized guarantees of trustworthiness, . . . [i]n *Wright*, the Supreme Court jettisoned such use of corroborative evidence.") (internal quotation and citation omitted); *Miller v. Miller*, 784 F. Supp. 390, 396 (E.D. Mich.) ("[T]he interlocking nature of Jordan's and Petitioner's confessions cannot be used to 'bootstrap' Jordan's [statements] to trustworthiness. The trustworthiness inquiry is limited to the totality of the circumstances that surround the making of Jordan's statements . . . ."), *aff'd* 983 F.2d 1067 (6th Cir. 1992) (table); *State v. Harris*, 739 So.2d 312, 316-17 (La. App. 1999) ("the Court noted [in *Wright*] that whether the co-perpetrator's statement interlocked with a confession by the defendant was *not* an appropriate factor to be considered in determining the trustworthiness and reliability of the declarant and his statement"; trustworthiness inquiry must be conducted "without reference to any corroboration provided by the interlocking nature of the two statements").

In addition to these six holdings, two federal courts of appeals have ruled, in direct opposition to the Washington Supreme Court's interpretation of *Wright*, that the *Wright* anti-corroboration rule is not limited to physical evidence. *Compare United States v. Gomez-Lemos*, 939 F.2d 326, 332 (6th Cir. 1991) (In *Wright*, "the Supreme Court reversed itself on the question of whether corroboration from other witnesses may

be considered in evaluating whether hearsay testimony meets the reliability requirements of the Confrontation Clause" and barred the consideration of such corroborative evidence) *and Government of the Virgin Islands v. Joseph*, 964 F.2d 1380, 1385, 1387 (3rd Cir. 1992) (*Wright* barred consideration of corroborative elements of other another witness's testimony to establish reliability of out of court statement) *with Rice*, 844 P.2d at 427 n.5 (*Wright* "appears to have only rejected the use of corroborating *physical* evidence to establish reliability").

Given all of these courts' diametrically opposed views of the Confrontation Clause and of this Court's precedent, this Court should grant certiorari to resolve this conflict. This Court has stated that an accomplice's confession that incriminates a criminal defendant is "devastating" and "enormously damaging" evidence against a criminal defendant. *Cruz*, 481 U.S. at 192. The admissibility of such evidence should not depend on which state the defendant lives in.

B. The Washington Supreme Court's Holding Contravenes This Court's Precedent.

A careful review of this Court's decisions reveals that, contrary to the Washington Supreme Court in this case, those courts that reject the use of "interlocking" evidence, have the better view of the Confrontation Clause as construed in *Roberts* and its progeny. *Roberts* explicitly links the Confrontation Clause with traditional hearsay law. 448 U.S. at 65. And as this Court explained in *Wright*, traditional hearsay law forbids courts from looking to *any* corroborative evidence in assessing the reliability of hearsay evidence. 497 U.S. at 19-20. There is no hearsay exception for interlocking statements. Nor has any court ever stated that an interlocking confession is more trustworthy corroborating evidence than other types of corroborating evidence.

Further, this Court in *Wright* strongly suggested, if not explicitly ruled, that *Cruz* should be read as permitting consideration of the interlocking nature of confessions. The *Wright* opinion notes that "[t]he Court [in *Cruz*] said nothing about whether the

codefendant's confession would be admissible against the defendant simply because it may have 'interlocked' with the defendant's confession." *Wright*, 497 U.S. at 823 n.*. Indeed, given the holding in *Cruz* – that a codefendant's interlocking confession is not admissible against a defendant in a joint trial in which the codefendant does not testify – it is difficult to imagine why such a confession would be admissible in a separate trial involving only the defendant.

The *Wright* opinion also explains that "although we considered in *Lee v. Illinois* the 'interlocking' nature of a codefendant's and a defendant's confessions to determine whether the codefendant's confession was sufficiently trustworthy for confrontation purposes, we declined to rely on corroborative physical evidence and indeed *rejected the 'interlock' theory in that case*." *Wright*, 497 U.S. at 824 (emphasis added). If this Court believed *Lee* only to have held that the confessions in that case were not truly interlocking, it would have said in *Wright* that it rejected the state's argument that the confessions were actually interlocking, not that it rejected "*the 'interlock' theory*" there. *Id.* (emphasis added). Rejecting a factual argument is different than rejecting a legal theory.

Finally, the plurality opinion in *Lilly v. Virginia* demonstrates that *Wright* prohibits all use of interlocking evidence. In *Lilly*, the Virginia Supreme Court held that a nontestifying accomplice's confession was reliable in part because of "the correspondence between [the accomplice's] account and the accounts of other persons acquired by law enforcement authorities" and because it was corroborated by another accomplice's trial testimony. *Lilly v. Commonwealth*, 499 S.E.2d 522, 534 (Va. 1998). A four-justice plurality of this Court, applying *Wright*, squarely rejected this basis of establishing reliability, holding that the fact "[t]hat other evidence at trial corroborated portions of [the accomplice's] statements is irrelevant." *Lilly v. Virginia*, 527 U.S. at 137 (plurality opinion). The plurality categorically explained that "'[t]o be admissible under the Confrontation Clause, . . . hearsay evidence used to convict a defendant must possess

indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.'" *Id.* at 138 (quoting *Wright*, 497 U.S. at 822). (None of the five concurring Justices addressed this particular issue.)

C. This Case is an Excellent Vehicle for Considering This Issue.

For three reasons, this case provides an excellent vehicle for considering this issue involving interlocking confessions.

First, *the sole reason* that Washington Supreme Court found the potential accomplice's custodial statement reliable here, and thus admissible under the *Roberts* guarantees-of-trustworthiness inquiry, was because parts of it interlocked with Petitioner's custodial statement. In fact, in the opinion the Washington Supreme Court was reviewing, the Washington Court of Appeals held that there were numerous reasons surrounding the accomplice's statement to doubt its veracity (such as the accomplice's motive to lie; her history of lying to police; her potential lack of knowledge; the custodial setting; and the fact that it described past events), App. 13a, and the Washington Supreme Court left those conclusions undisturbed. Consequently, the correctness of the Washington Supreme Court's decision, and admissibility of the accomplice's statement, stands or falls according to whether evidence of "interlock" permits a court to find that an accomplice's out of court confession is sufficiently trustworthy for admission against a criminal defendant.

Second, it is clear from the opinions below that if the accomplice's statement was erroneously admitted at Petitioner's trial, the error was not harmless. Not only does the interlocking nature of the accomplice's confession provide the sole basis for the Washington Supreme Court's decision, which would allow this Court to reverse without reaching any other issues, but the Washington Court of Appeals – the only court to conduct a harmless error inquiry in this case – expressly held that "[t]here is reasonable doubt that the jury would have reached the same verdict in the absence of Sylvia's statements." App. 15a. This is because Petitioner maintained at trial that he acted in self-

defense, and Sylvia's statement "refutes [that] claim." *Id.* Indeed, this case presents the paradigmatic situation in which the admission of a nontestifying accomplice's interlocking confession prejudices the defense – *i.e.*, when the defendant disputes the prosecution's interpretation of his confession and the accomplice's statement suggests that the defendant is not being fully truthful about a critical aspect of his defense. *See Cruz*, 481 U.S. at 192 (admitting interlocking confession is "enormously damaging" when defendant seeks at trial to dispute the accuracy of his confession); *see also Wilson v. State*, 639 A.2d 125, 137 (Md. 1994) (erroneous admission of interlocking confession that "strongly buttressed" defendant's confession and prosecution's theory was not harmless); *Watkins*, 475 N.W.2d at 747 (same).[1]

Third, this case comes to this Court on direct review (so no collateral relief complications are present), and there is no doubt that Petitioner's confrontation argument was properly presented to the state courts. Both the Washington Court of Appeals and the Washington Supreme Court reached Petitioner's confrontation argument without noting any preservation issues, and the Washington Supreme Court expressly held as a matter of state law that Petitioner had not waived this argument by also relying upon Washington's marital privilege statute.

[1] This is another point on which Washington Supreme Court precedent conflicts with this Court's. Although the Washington Supreme Court held in *Rice* that an interlocking confession that was "virtually identical to that of a defendant" may be deemed harmless, 844 P.2d at 426-27, this Court made it clear in *Cruz* that "'interlocking' bears a positively inverse relationship" to prejudice to the defendant's case. 481 U.S. at 192. "A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession." *Id.* The Washington Supreme Court's "virtually identical" standard has it exactly backwards.

II. THIS COURT SHOULD GRANT CERTIORARI TO REEXMINE THE CONFRONTATION CLAUSE FRAMEWORK ESTABLISHED IN *OHIO V. ROBERTS* AND TO HOLD THAT OUT-OF-COURT "TESTIMONIAL" STATEMENTS OFFERED AGAINST A DEFENDANT ARE PER SE INADMISSIBLE.

The split of authority concerning interlocking confessions is endemic of the need to reexamine the Confrontation Clause in a more fundamental manner. This Court should take this opportunity to do so and adopt a new framework that decouples the Confrontation Clause from ordinary hearsay law. This modification would not require this Court to overrule any of its prior decisions, but it would greatly simplify applications of the Confrontation Clause, deconstitutionalize hearsay law, and bring the Confrontation Clause back in line with its textual and historical underpinnings.

A. Justices of This Court, Leading Scholars, and the United States Solicitor General All Recently Have Urged This Court to Reexamine the *Ohio v. Roberts* Framework.

In *White v. Illinois*, 502 U.S. 346 (1992), Justices Thomas and Scalia noted that "this Court's cases unnecessarily have complicated and confused the relationship between the constitutional right to confrontation and the hearsay rules of evidence." *White*, 502 U.S. at 365 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment). Consequently, they urged this Court to abandon the hearsay-based confrontation framework that this Court established in *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), in favor of one, advocated by the Solicitor General of the United States, that focuses on the face-to-face confrontation of "witnesses" whose "testimony" is offered against criminal defendants. Under this "testimonial" approach, the Confrontation Clause bars the introduction of extrajudicial statements "only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions." *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in judgment). But when the testimonial approach bars the admission of such a statement, it bars it absolutely; whether such a statement bears particularized guarantees of trustworthiness is irrelevant. On the other hand, under this approach, if the

out-of-court statement at issue is not "testimonial," only hearsay law governs its admissibility. The Confrontation Clause is not implicated, regardless of how unreliable the statement might appear to be. *Id.* at 366.

During the last several years, several leading scholars have endorsed this general testimonial approach as consonant with the history and purpose of the Confrontation Clause. *See, e.g.*, Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. Rev. 1011 (1998); Akil Reed Amar, The Constitution and Criminal Procedure 129-31 & n.194 (1997); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 559, 561 (1992). The right to confrontation long predates modern hearsay law and was adopted as a means of prohibiting the old English practice of allowing witnesses to testify against defendant via affidavits, ex parte depositions, and written confessions. *See, e.g.*, *White*, 502 U.S. at 359-64 (Thomas, J., concurring in part and concurring in judgment); Friedman, 86 Geo. L. Rev. at 1022-26. The "testimonial" approach also honors the text of the Confrontation Clause by actually giving meaning to the word "witnesses" in the Clause, for only witnesses offer testimony. *See id.* And, as opinions and briefs to this Court have noted, this approach also conforms to this Court's consistent instincts concerning the reach of the Confrontation Clause. All of this Court's decisions would have come out the same way under the testimonial approach. *See White*, 502 U.S. at 365 & n.2 (Thomas, J., concurring in part and concurring in judgment); Brief *Amicus Curiae* for ACLU in *Lilly v. Virginia*, 527 U.S. 116 (1999), at 25-29.

The problem with the current *Roberts* framework, as recently summarized by Professor Friedman, is that it:

> gives the [confrontation] right too broad a scope and then denigrates it by dilution. Under this conception, the confrontation right is treated as a generalized protection against unreliable evidence – a role for which it is not intended, and which . . . it does not perform well. As the same time, this conception fails to recognize the confrontation right as an expression of one of the basic

> procedures of our criminal justice system. Thus, . . . this conception makes easy cases hard; instead of treating the Confrontation Clause as a ringing endorsement of a principle that commands widespread respect, the courts treat is as a complex, amorphous, and technical expression of principles that are baffling even to lawyers.

Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1228 (2002). Instead of protecting criminal defendants' procedural right to a particular type of adversarial adjudicative process, in short, the *Roberts* framework conceptualizes the confrontation right as a nebulous backup to ordinary rules of evidence.

Lilly v. Virginia, 527 U.S. 116 (1999), this Court's most recent Confrontation Clause case, exemplifies the unnecessary confusion that this Court's current doctrine generates. Although the admittance of the extrajudicial statement at issue there, an accomplice's custodial confession, constituted a "paradigmatic" Confrontation Clause violation under the testimonial approach, *id.* at 143 (Scalia, J., concurring in part and concurring in judgment), the other seven Justices spent numerous pages parsing out the complexities of the *Roberts* test and were still unable to agree on how exactly it applied there.

Nevertheless, because *Lilly*'s four-justice plurality agreed with Justices Scalia and Thomas that both the *Roberts* framework and the testimonial approach mandated exclusion of the accomplice's confession, this Court declined to undertake a thorough reexamination of the *Roberts* framework. *See Lilly*, 527 U.S. at 124-25 (plurality opinion). Justice Breyer, however, suggested that he was inclined to adopt the testimonial approach and wrote separately expressly to say that "the fact that we do not reevaluate [the *Roberts* framework] in this case does not end the matter. It may leave the question open for another day." *Id.* at 142-43 (Breyer, J., concurring). Petitioner respectfully suggests that that day has come.

B. The Need for a Reexamination of the *Roberts* Framework Is Pressing Because It Regularly Allows the Admission of Extrajudicial Statements That Implicate the Core Concerns of the Confrontation Clause.

Although this Court in *Lilly* deemed it unnecessary to reevaluate the *Roberts* framework, the plurality seemingly attempted to bring the *Roberts* "particularized guarantees" inquiry closer to the per se testimonial approach. The plurality stated: "It is *highly unlikely* that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old ex parte affidavit practice – that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." 527 U.S. at 137 (emphasis added). A review of case law in the three and one-half years since that decision, however, reveals that far from being "highly unlikely" that such extrajudicial statements will be admitted against criminal defendants, the practice is still quite common throughout the country. Accordingly, there can no longer be any doubt that the *Roberts* framework regularly allows courts to admit evidence at the heart of the "evil to which the [Confrontation Clause] is directed," *White*, 502 U.S. at 365 (Thomas, J., concurring), and that would be per se inadmissible under a testimonial application of the Clause. This Court should not allow this subversion of a critical constitutional guarantee to continue.

In addition to the Washington Supreme Court in this case, several other courts since the *Lilly* decision have upheld the admission of accomplices' custodial confessions that implicate defendants. *See United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (4th Cir. 2001) (accomplice's custodial statement that implicated defendant), *cert. denied*, 535 U.S. 926 (2002); *People v. Farrell*, 34 P.3d 401, 406-08 (Colo. 2001) (accomplice's custodial confession that spread blame to defendant); *Stevens v. People*, 29 P.3d 305, 314-18 (Colo. 2001) (accomplice's statement confession that incriminated defendant and minimized accomplice's girlfriend's involvement in crime);

Taylor v. Commonwealth, 63 S.W.3d 151, 166-67 (Ky. 2001) (custodial confession of accomplice that implicated defendant); *State v. Sonthinkoummane*, 769 A.2d 330 (N.H. 2000) (custodial confession by codefendant that implicated defendant); *State v. Hawkins*, ___ N.E.2d ___, 2002 Ohio App. LEXIS 7208 (Ohio App. Dec. 31, 2002) (tape recorded statement of accomplice to police that implicated defendant); *State v. Bintz*, 650 N.W.2d 913, 915-18 (Wis. App.) (accomplice's – defendant's brother's – custodial statement implicating defendant), *review denied*, 653 N.W.2d 891 (Wis. 2002); *People v. Lawrence*, 55 P.3d 155 (Colo. App. 2001) (codefendant's statements to police that implicated defendant); *State v. Jones*, 15 P.3d 616, 623-25 (Or. App. 2000) (accomplice custodial confession that implicated defendant); *State v. Marshall*, 737 N.E.2d 1005, 1008-09 (Ohio App. 2000) (videotaped confession by accomplice that implicated defendant); *People v. Schutte*, 613 N.W.2d 370, 376-77 (Mich. App. 2000) (accomplice's statement to police "that inculpated defendant"); *People v. Thomas*, 730 N.E. 618 (Ill. App. 2000) (potential accomplice's statement to police that incriminated defendant); *People v. Campbell*, 721 N.E.2d 1225, 1230 (Ill. App. 1999) (written statement to police by accomplice that implicated defendant). The Seventh Circuit – in a statement that sums up the current state of the law and shows how far from the Confrontation Clause's roots it has strayed – has held that the fact that an accomplice confessed to law enforcement officers during a custodial interrogation is "*but one factor* implicating the reliability," and hence the admissibility, of his statements. *United States v. Castelan*, 219 F.3d 690, 695 (7th Cir. 2000) (emphasis added).

Several other courts have held that the admission of similarly unquestionably "testimonial" statements satisfies the *Roberts* framework. One federal court of appeals "regularly" allows the admission of accomplices' plea allocutions that implicate the defendant, and two other circuits expressly have adopted this rule. *United States v. Dolah*, 245 F.3d 98, 105 (2d Cir. 2001); *accord United States v. Aguilar*, 295 F.3d 1018 (9th Cir. 2002); *United States v. Centracchio*, 257 F.3d 518, 528 (7th Cir. 2001); *United States v. Petrillo*, 237 F.3d 119, 122 (2d Cir. 2000); *United States v. Moskowitz*, 215 F.3d 265, 268-69 (2d Cir. 2000); *United States v. Gallego*, 191 F.3d 156, 168 (2d Cir. 1999).

Two other federal court of appeals, applying *Roberts* and *Lilly*, have held that a witness's prior grand jury testimony that inculpates a defendant is admissible against him whenever it satisfies "the equivalent circumstantial guarantees of trustworthiness" test under Federal Rule of Evidence 807. *United States v. Papajohn*, 212 F.3d 1112, 1116-20 (8th Cir. 2000); *accord United States v. Thomas*, 2002 WL 429383 (4th Cir. 2002). The Eighth Circuit, in fact, in reaching this conclusion, stated that "since only four Justices concurred in the part of the [*Lilly*] opinion" stating it is highly unlikely that prior testimony given under circumstances similar to the old ex parte affidavit practice will be admissible, "it does not bind us." *Id.* at 1119. Regardless of whether this is an accurate application of the "narrowest grounds" rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), it is highly disquieting for a federal court of appeals to reach a decision with which it realizes six sitting Supreme Court Justices (the *Lilly* plurality plus Justices Scalia and Thomas) disagree.[2]

Other courts have allowed the admission of prior testimony from a preliminary hearing of another trial, *Bintz*, 650 N.W.2d at 918-20, and from another trial, *State v.*

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[2] Because the testimonial approach is both "narrow[er]" and "broad[er]" than the *Roberts* framework, *Lilly*, 527 U.S. at 141 (Breyer, J., concurring), courts have had particular difficulty in determining whether the plurality opinion in *Lilly* is binding law. In addition to the Eighth Circuit's *Papajohn* opinion, compare *People v. Beasley*, 609 N.W.2d 581, 587 (Mich. App. 2000) (*Lilly* plurality opinion "is not binding precedent"); *Rankins v. Commonwealth*, 523 S.E.2d 524, 531 & n.7 (*Lilly* plurality not binding because Justice Scalia's approach to dealing with accomplice's custodial confessions is narrower) and *State v. Jones*, 15 P.3d 616, 624 (Or. App. 2000) (same) with *United States v. Gomez*, 191 F.3d 1214, 1221 (10th Cir. 1999) (*Lilly* plurality controls because Justice Scalia "took the most resolute stance against the use of [accomplice confessions]"); *Stribling v. Smith*, 2000 WL 796181, at *7 & n.6 (E.D. Mich. 2000) (same because Justice Scalia applied "categorical[]" rule) and *Stevens v. People*, 29 P.3d 305, 324 (Colo. 2001) (Bender, J., dissenting) (*Lilly* plurality is binding because Justices Scalia and Thomas believe that "all custodial statements made to law enforcement by an accomplice . . . by their very nature" are inadmissible under the Confrontation Clause). Laying down a clear framework in this case would alleviate this confusion.

McNeill, 537 S.E.2d 518, 524 (N.C. App. 2000), despite the fact that the testimony incriminated the current defendant and he never had a chance to cross-examine the witnesses. In these cases, the courts – like the courts in the plea allocution line of cases, *see, e.g., Aguilar*, 295 F.3d at 1021-23 – found that the prior testimony exhibited "particularized guarantees of trustworthiness" under *Roberts* in part because it was given under oath. Whatever merit this analysis may have under the *Roberts* approach, it flies in the face of the purpose of the Confrontation Clause, which was to ban the admission of ex parte affidavits and the like, which were given under oath, but which the Framers nevertheless believed deprived defendants of their right to the adversary process.

The "particularized guarantees" test also persists in the wake of the *Lilly* decision to lead inconsistent and improbable results. For example, while the Seventh Circuit recently held that a DEA agent's statement to an accomplice that "he could help himself by cooperating with the agents" detracted from the trustworthiness of a confession, *Castelan*, 219 F.3d at 695, a state court of appeals held the same year that an accomplice confession was sufficiently reliable for admission even though the police told him that they "may be able to cut him some slack if he confessed." *Marshall*, 737 N.E.2d at 1009. While this Court's plurality opinion in *Lilly* stated that "a suspect's consciousness of his *Miranda* rights has little, if any, bearing on the likelihood of truthfulness of his statements," 527 U.S. at 138, a state court of appeals held last year that accomplice's statement was reliable in part because "she was fully advised of her [*Miranda*] rights." *Hawkins*, 2002 Ohio App. LEXIS at **18. And while the very purpose of the *Roberts* test is to screen out untrustworthy evidence, Washington Supreme Court recently went so far to hold that an extrajudicial statement by an alleged child victim to a police officer had particularized guarantees sufficient to permit its admission at trial even though the child was incompetent to testify because he was "unable to characterize the difference between truthful and false statements." *State v. C.J.*, ___ P.3d ___, 2003 WL 252147 (Wash. Feb. 6, 2003). Unless this Court is prepared to undertake a case-by-case

examination of such factbound applications of the "particularized guarantees" test, courts will continue to use their enormous discretion to allow out-of-court statements like these to be admitted against criminal defendants, even though it is quite difficult to say that "adversarial testing would little to [their] reliability." *Wright*, 497 U.S. at 821.

Accordingly, this Court should not wait any longer to reexamine the *Roberts* framework. That framework's totality-of-the-circumstances, reliability-based standard unalterably permits the admission of extrajudicial testimony that flouts the history, text, and purpose of the Confrontation Clause. Adopting the testimonial approach would terminate this constitutional anomaly and return the Confrontation Clause to its proper place in the realm of criminal procedure, and at the same time would deconstitutionalize ordinary hearsay law. This case, which presents a "paradigmatic" violation of the Confrontation Clause under the testimonial approach, *Lilly*, 527 U.S. at 143 (Scalia, J., concurring in part and concurring in judgment), presents the perfect vehicle to do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of Washington,
En Banc.

STATE of Washington, Petitioner,
v.
Michael D. **CRAWFORD**, Respondent.

No. 71683-8.

Argued March 5, 2002.
Decided Sept. 26, 2002.

Defendant was convicted, after a jury trial in the Superior Court, Thurston County, Richard A. Strophy, J., of first-degree assault while armed with deadly weapon. Defendant appealed. The Court of Appeals reversed. Review was granted. The Supreme Court, Bridge, J., held that: (1) defendant's assertion of marital privilege did not waive his confrontation rights as to his wife's hearsay statements, and (2) the wife's hearsay statements were sufficiently reliable to be admitted under the Confrontation Clause.

Court of Appeals reversed; conviction reinstated.

West Headnotes

[1] Criminal Law ⇐662.80
110k662.80

Defendant did not waive his Confrontation Clause rights regarding his wife's tape-recorded hearsay statements to police officers, which were admitted in the prosecution for assault, where defendant exercised his marital privilege to prevent his wife from testifying. U.S.C.A. Const.Amend. 6; West's RCWA 5.60.060(1).

[2] Criminal Law ⇐662.80
110k662.80

Courts are hesitant to accept waiver of a defendant's Sixth Amendment confrontation rights, because of their significance in the trial process. U.S.C.A. Const.Amend. 6.

[3] Criminal Law ⇐662.80
110k662.80

A defendant may waive the right to confront witnesses against him when his own misconduct is responsible for a witness' unavailability at trial. U.S.C.A. Const.Amend. 6.

[4] Criminal Law ⇐662.8
110k662.8

Simply because an extrajudicial statement falls within a hearsay exception does not mean that it will satisfy the Sixth Amendment right to confrontation; therefore, the court will employ specific safeguards to ensure that the proffered evidence offers some reliability in terms of the declarant's perception, memory, and credibility, which is a function traditionally performed by cross-examination. U.S.C.A. Const.Amend. 6.

[5] Criminal Law ⇐662.8
110k662.8

Hearsay statements, to be admissible under the Confrontation Clause, must be admissible under the rules of evidence, and the statements must contain sufficient indicia of reliability and trustworthiness. U.S.C.A. Const.Amend. 6.

[6] Criminal Law ⇐662.8
110k662.8

Admissibility under a firmly-rooted exception to the hearsay rule will satisfy the requirement that extrajudicial statements must contain sufficient indicia of reliability and trustworthiness, as element for admission under Confrontation Clause. U.S.C.A. Const.Amend. 6.

[7] Criminal Law ⇐662.8
110k662.8

If the hearsay exception under which the extrajudicial statements are admissible is not firmly rooted, then the court will consider the following nonexclusive factors to determine the relative reliability of hearsay statements, for purposes of Confrontation Clause analysis: (1) whether declarant, at time of making statement, had apparent motive to lie; (2) whether declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) spontaneity of the statement; (5) whether trustworthiness is suggested from timing of statement and relationship between declarant and witness; (6) whether statement contains express

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assertions of past fact; (7) whether declarant's lack of knowledge could be established by cross-examination; (8) remoteness of possibility that declarant's recollection is faulty; and (9) whether surrounding circumstances suggest that declarant misrepresented defendant's involvement. U.S.C.A. Const.Amend. 6.

[8] Criminal Law ⇐419(2)
110k419(2)

Statements that defendant's wife made to police were not "hearsay," in prosecution for assault; they were not offered to prove the truth of the matters asserted, and instead were offered to demonstrate that defendant and his wife lied about the circumstances preceding the assault. ER 801(c).

[9] Criminal Law ⇐419(2)
110k419(2)

[9] Criminal Law ⇐662.8
110k662.8

Out-of-court statements raise hearsay and Confrontation Clause objections only when they are offered to prove the truth of the matter asserted. U.S.C.A. Const.Amend. 6; ER 801(c).

[10] Criminal Law ⇐419(1.5)
110k419(1.5)

[10] Criminal Law ⇐419(5)
110k419(5)

The second of two statements that defendant's wife made to police constituted "hearsay," in prosecution for assault; the wife was unavailable as witness because husband invoked the marital privilege, and the statements were offered to prove the truth of the matters asserted. West's RCWA 5.60.060(1); ER 801(c).

[11] Criminal Law ⇐662.8
110k662.8

A statement against penal interest is not considered a firmly-rooted exception to the hearsay rule, for purpose of Confrontation Clause analysis for admission of extrajudicial statements; thus, such a statement, if it inculpates the defendant, is admissible against defendant only when it bears adequate indicia of reliability. U.S.C.A. Const.Amend. 6; ER 804(b)(3).

[12] Criminal Law ⇐417(15)
110k417(15)

If self-exculpatory statements are included within a statement that is generally inculpatory to the declarant, only those portions that are actually self-inculpatory are admissible, under the hearsay exception for statements against penal interest. ER 804(b)(3).

[13] Criminal Law ⇐417(15)
110k417(15)

Hearsay statements of defendant's nontestifying wife to police, that defendant was "infuriated" and "past tipsy" when the assault occurred, that defendant said the victim "deserves a[n] ass whoopin'," and that victim may have reached into his pocket, possibly for a weapon, but was not holding a weapon when defendant stabbed him, were against wife's penal interest, as element for admission under hearsay exception for statements against penal interest, where wife had potential accomplice liability for the assault; wife had shown defendant where victim could be found, wife was present throughout the assault, wife did not turn to police when she had the opportunity, wife's statements did not shift blame to defendant, and wife's accomplice liability would be higher if defendant's criminal liability was higher. West's RCWA 9A.08.020(3)(a); ER 804(b)(3).

[14] Criminal Law ⇐662.10
110k662.10

A co-defendant's confession is presumed unreliable, for purposes of analyzing its admissibility under the Confrontation Clause. U.S.C.A. Const.Amend. 6.

[15] Criminal Law ⇐662.10
110k662.10

When a co-defendant's confession is virtually identical, i.e., interlocks, to the defendant's confession, it may be deemed reliable, for purposes of Confrontation Clause analysis regarding admissibility of the co-defendant's confession. U.S.C.A. Const.Amend. 6.

[16] Criminal Law ⇐662.8
110k662.8

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Statements that defendant and his wife gave to police were virtually identical and interlocking, so that wife's hearsay statements to police, which were otherwise admissible under a hearsay exception as statements against her penal interest, were sufficiently reliable, for purposes of Confrontation Clause analysis in prosecution for assault; defendant and his wife were equally unsure whether victim had been holding a weapon, and neither defendant nor his wife clearly stated that victim had a weapon in hand from which defendant was simply defending himself. U.S.C.A. Const.Amend. 6; ER 804(b)(3)

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**657 *426 Edward Holm, Thurston County Prosecutor, Steven Sherman, Deputy, Olympia, for Petitioner.

Thomas Doyle, Hansville, Patricia Pethick, Tacoma, for Respondent.

**658 BRIDGE, J.

This case presents two issues: (1) whether a defendant waives an objection under the confrontation *427 clause to the admission of his wife's hearsay statements by exercising his marital privilege to prevent his spouse from testifying; and (2) whether the wife's statements are otherwise admissible as an exception to the hearsay rule or as an interlocking confession. We hold that a defendant does not waive his confrontation rights when he invokes the marital privilege. We also conclude that the statements here are admissible because the wife's statements interlock with those of her husband and hence provide adequate indicia of reliability to satisfy confrontation clause concerns.

FACTS

On August 5, 1999, Michael Crawford stabbed Richard Rubin Kenneth Lee at Lee's apartment. *State v. Crawford*, noted at 107 Wash.App. 1025, 2001 WL 850119, at *1 (2001). Police arrested Crawford that evening and they collected two taped statements from both Crawford and his wife, Sylvia, who had been present at the time of the assault. Id. The first statements contained roughly the same account of the attack: the three had collected at Lee's house; Crawford left to buy alcohol; when he returned, Lee was making sexual advances toward Sylvia; Crawford stabbed Lee twice. Id.

Several hours after police taped the first statements, they again questioned the Crawfords independently regarding the events of August 5. Id. Their stories were again similar to each other, but distinctly different from the earlier version of the encounter. Id. This time the Crawfords each revealed that the alleged sexual assault had actually occurred several weeks earlier. Id. On the night in question, both Crawfords contended, Michael became angry when Lee was mentioned and he and his wife left to find Lee. Id. Sylvia directed her husband to Lee's apartment and after talking with him for a short period, Crawford stabbed Lee twice. Id. Although unclear, the main distinguishing factor in these second statements was that Crawford alluded that Lee *may* have had something in his hand *when* Crawford *428 stabbed Lee, while Sylvia implied that Lee *may* have grabbed for something *after* Crawford stabbed Lee. Id.

Crawford was charged with attempted first degree murder while armed with a deadly weapon and first degree assault while armed with a deadly weapon. Clerk's Papers (CP) at 2. At trial, Crawford claimed that he acted in self- defense and he invoked the marital privilege to prevent his wife from testifying against him. Report of Proceedings (RP) at 7-8. The trial court admitted both of Sylvia's statements on the grounds that the statements would not violate the marital privilege and because the court determined that the statements were sufficiently reliable to alleviate confrontation clause concerns. RP at 45, 53; RP at 219-21, Exs. 37, 38; RP at 231, Exs. 41-42. A jury subsequently convicted Crawford of first degree assault while armed with a deadly weapon. CP at 2. In an unpublished opinion, a divided Court of Appeals concluded that Crawford did not waive his right to confrontation when he invoked the marital privilege. *Crawford*, 2001 WL 850119, at *1. It then held that admitting Sylvia's second statement was reversible error because her statement did not possess adequate indicia of reliability, nor did it interlock with Michael's second statement. Id. at *5-7. Accordingly, the Court of Appeals reversed Crawford's conviction. Id. at *1. We granted review.

WAIVER OF RIGHT TO CONFRONTATION

[1] Crawford invoked the marital privilege, RCW 5.60.060, to keep his wife from testifying against him at trial. RP at 7. The marital privilege in

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Washington states in relevant part:

> A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage.

*429 RCW 5.60.060(1). Neither Crawford nor the State called Sylvia to testify. *See* RP at **659 7-14. Crawford claims, however, that his confrontation right under the Sixth Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, was violated when Sylvia's hearsay statements to the police were admitted at trial.

The State contends that Crawford waived his right to confrontation when he neglected to call Sylvia at trial, relying on *State v. Salazar*, 59 Wash.App. 202, 796 P.2d 773 (1990) and *In re Personal Restraint of Sauve*, 103 Wash.2d 322, 692 P.2d 818 (1985), to support its position. While instructive, both *Salazar* and *Sauve* contain a key distinction from the case before us, making them distinguishable. In those cases the witness was "available"; Sylvia Crawford was not an available witness.

In *Salazar*, the defense counsel did not call an informant suggesting that defense was unable to locate him. 59 Wash.App. at 216, 796 P.2d 773. Rejecting the assertion that the witness was unavailable, the court stated, "We have held that a defendant who fails to call an available hearsay declarant waives an objection under the confrontation clause to admission of the hearsay." *Salazar*, 59 Wash.App. at 217, 796 P.2d 773 (citing *State v. Borland*, 57 Wash.App. 7, 12, 786 P.2d 810 (1990)). "Similarly, defense counsel's failure to call [the informant], who we assume was available absent persuasive evidence to the contrary, waived any confrontation clause objection." *Id.*

In *Sauve*, the defendant claimed that his confrontation right was violated when the police officer who received an informant's tip, failed to testify at the suppression hearing. 103 Wash.2d at 329, 692 P.2d 818. Although the court did not directly hold that Sauve had waived his confrontation right, it did note that the defendant's failure to exercise his rights at trial did not constitute a denial of such rights by the court. *Sauve*, 103 Wash.2d at 330, 692 P.2d 818 (citing *State v. Murphy*, 35 Wash.App. 658, 669 P.2d 891 (1983); *State v. Whittington*, 27 Wash.App. 422, 618 P.2d 121 (1980)). Accordingly, the court stated,

> There is no evidence that petitioner asked the State for the testimony of the officer who received the tip, nor did petitioner *430 himself attempt to call the officer to the stand. The State was not given a chance at trial to either present the officer's testimony or prove his unavailability. The failure of petitioner to exercise his rights at trial does not constitute a denial of such rights.
> *Id.*

In both *Salazar* and *Sauve* the witnesses were available, but the defense failed to call them at trial. In the case presented, in contrast, the witness, Sylvia Crawford, was unavailable to testify because Michael Crawford had invoked his marital privilege. The marital privilege explicitly states that "[a] husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband." RCW 5.60.060(1). This language specifically denies Sylvia the ability to testify either for or against her husband, rendering her unavailable as a witness. Although Michael, not Sylvia, invoked the privilege, the result is the same--Sylvia was unavailable to testify, unlike the witnesses in *Salazar* and *Sauve*. Therefore, the situation before us is distinct from *Salazar* and *Sauve* and it does not logically follow that Crawford waived his confrontation rights by not calling his wife to testify.

The conclusion that Crawford did not waive his confrontation rights is supported by a decision from this court that directly addressed the issue of marital privilege and extrajudicial statements by a third party. *See State v. Burden*, 120 Wash.2d 371, 374, 841 P.2d 758 (1992). In *Burden*, this court stated, "Here, the defendant asserts admission of Mary Burden's extrajudicial statements by third persons would indirectly violate the testimonial privilege and place [the defendant] in the position of having to waive the privilege to refute the testimony or allow the testimony without cross examination. We have previously rejected this argument." *Id.* (citing *State v. Kosanke*, 23 Wash.2d 211, 160 P.2d 541 (1945)). By recognizing the rejection of this argument, this court implied that the testimonial privilege is not violated by admissible hearsay

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statements*431 and, furthermore, that the defendant does not have **660 to waive the marital privilege to refute the testimony. Therefore, the defendant cannot be said to have waived his right to cross examination. [FN1]

FN1. Citing *Kosanke*, the *Burden* court further supported its position that the admission of the testimony neither indirectly violated the marital privilege nor forced the defendant to waive the privilege to refute the testimony.
"[T]he court [has not gone] so far as to hold that relevant and material evidence could not be adduced merely because, in order to refute the same, the wife of a defendant might have to be called as a witness. In this case the wife of appellant was not called as a witness by respondent, nor was the attention of the jury called to her in such a way as to require objection on the part of appellant in order to preserve his rights under the statute.... [T]he fact that refutation of competent evidence would require the wife being a witness does not make it erroneous to adduce the testimony. *The statute [testimonial privilege] was not violated either directly or indirectly.*"
Burden, 120 Wash.2d at 374, 841 P.2d 758 (quoting *Kosanke*, 23 Wash.2d at 217-18, 160 P.2d 541). According to this passage it is clear that the marital privilege still stands, as well as the right to confront the witness; neither has been waived.

[2][3] Further, courts are hesitant to accept waiver of a defendant's Sixth Amendment rights because of their significance in the trial process. *See generally* John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L.REV. 835 (1996). " 'There are few subjects, perhaps, upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' " *Id.* at 840 (quoting *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). Where a waiver has been recognized, the waiver usually occurs when the defendant has inappropriately caused the witness's unavailability. *Id.* at 844. Thus, " 'a defendant may waive the right to confront witnesses against him when his own misconduct is responsible for a witness's unavailability at trial.' " *Id.* at 842 (quoting *United States v. Potamitis*, 739 F.2d 784, 788 (2d Cir.1984)). Misconduct is not apparent when a defendant invokes a statutory privilege, however. *See United States v. Barlow*, 693 F.2d 954, 962 (6th Cir.1982) (suggesting that only sham marriage would result in waiver, but admitting legitimate spouse's grand jury testimony when it met *432 adequate guarantees of trustworthiness). In the case before us Crawford invoked a recognized statutory privilege. [FN2]

FN2. Although no formula has emerged for application of the confrontation waiver rule, case law suggests six major legal issues that courts will resolve before applying the doctrine: "(1) witness unavailability, (2) cause of unavailability, (3) intent, (4) standard of proof, (5) statement reliability, and (6) waiver hearing procedure." Kroger, *supra*, at 846. The key element for this case is the cause of the unavailability. "Two paradigmatic ways in which a defendant satisfies the causation requirement have evolved: murder and threats." *Id.* at 849. From this statement it is apparent that the evolution of the waiver doctrine has not been directed at the legitimate invocation of statutory privileges, absent threat or other indication of malfeasance.

As the Court of Appeals acknowledged here, forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice. *Crawford*, 2001 WL 850119, at *1. The Court of Appeals aptly noted that this court traditionally has "not required a defendant to waive one right to preserve another." *Id.* (citing *State v. Michielli*, 132 Wash.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of case where defendant was forced to choose between waiving right to speedy trial or right to effective assistance of counsel); *State v. Price*, 94 Wash.2d 810, 814, 620 P.2d 994 (1980) (stating that forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant)). Both *Michielli* and *Price* present situations where a defendant was forced to balance his trial rights and ultimately select one right to the exclusion of the other. To force a defendant to choose the more difficult position of confronting his spouse on the stand, or to assume that he has waived his confrontation right by electing not to call his wife, presents a similarly untenable choice and undermines the marital privilege itself. Therefore, we hold that Crawford did not waive his right to confrontation when he invoked the marital privilege.

**661 ADMISSIBILITY OF HEARSAY

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If Crawford did not waive his right to confrontation, the State contends in the alternative that Sylvia's out-of-court *433 statements to the police were admissible hearsay that did not violate the Sixth Amendment.

This court has noted a distinction between in-court testimony and extrajudicial statements by a spouse. In drawing a distinction between the two, we have concluded that hearsay statements may be admissible under certain circumstances. *Burden*, 120 Wash.2d at 377, 841 P.2d 758. Forcing a spouse to testify, however, challenges the policy purposes behind the privilege. In *Burden*, this court determined that the policy purposes--fostering domestic harmony and preventing discord, reflecting the natural repugnance of having one spouse testify against the other, and preventing the testifying spouse from having to choose between perjury, contempt of court, or jeopardizing the marriage--supported this distinction. *Id.* at 375, 841 P.2d 758 (citing *State v. Thorne*, 43 Wash.2d 47, 55, 260 P.2d 331 (1953); *State v. Wood*, 52 Wash.App. 159, 163, 758 P.2d 530 (1988); Teresa Virginia Bigelow, Comment, *The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications*, 54 WASH. L.REV. 65, 70 (1978-79)). We concluded that the latter two purposes would not be affected by allowing third person testimony, because the spouse would not be testifying in court, and questioned the applicability of the first purpose. *Burden*, 120 Wash.2d at 375-76, 841 P.2d 758. Thus, as we have acknowledged, confronting a spouse on the stand is quite distinct from admitting an extrajudicial statement.

[4] To assess whether an extrajudicial hearsay statement is admissible we apply a multilayered analysis, in consideration of the valuable constitutional protections afforded by the Sixth Amendment. Simply because a statement falls within a hearsay exception does not mean that it will satisfy the Sixth Amendment. *State v. Rice*, 120 Wash.2d 549, 565, 844 P.2d 416 (1993). Therefore, the court will employ specific safeguards " 'to ensure that the proffered evidence offers some reliability in terms of the declarant's perception, memory and credibility--a function traditionally performed by cross examination.' " *Id.* at 566, 844 P.2d 416 (quoting *State v. Anderson*, 107 Wash.2d 745, 750-51, 733 P.2d 517 (1987)).

[5][6][7] *434 First, the statements must be admissible under the rules of evidence. *Rice*, 120 Wash.2d at 564, 844 P.2d 416. Second, the statements must contain a sufficient indicia of reliability and trustworthiness to satisfy the requirements of the confrontation clause. *Id.* A firmly rooted exception to the hearsay rule will satisfy this requirement. *State v. Davis*, 141 Wash.2d 798, 845, 10 P.3d 977 (2000). If the exception is not firmly rooted, then the court will consider nine nonexclusive factors to determine the relative reliability of the hearsay statements. [FN3] *Rice*, 120 Wash.2d at 565-66, 844 P.2d 416; *State v. Whelchel*, 115 Wash.2d 708, 722-25, 801 P.2d 948 (1990). Alternatively, the indicia of reliability test can be met if the statements "interlock" in accordance with our decision in *Rice*. 120 Wash.2d at 569-70, 844 P.2d 416.

FN3. The nine factors include: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

[8][9] Sylvia's first statement to the police is not hearsay because it was not offered to prove the truth of the matter asserted. [FN4] ER 801(c). Instead, as the Court of Appeals noted, it was offered to demonstrate that the Crawfords lied about the circumstances preceding the assault. *Crawford*, 2001 WL **662 850119, at *5. Considering that out-of-court statements raise hearsay and confrontation clause objections only when they are offered to prove the truth of the matter asserted, Sylvia's first statement is not inherently objectionable. *State v. Parris*, 98 Wash.2d 140, 145, 654 P.2d 77 (1982). It will be admissible, however, only if it is relevant under ER 401, and it is relevant only if her second statement is admitted.

FN4. The defense counsel did not object to the admission of the statements as hearsay when they

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were presented at trial. *See* RP at 219- 32. Defense argument appears to hinge on the previous invocation of the marital privilege and right to confrontation. *See* RP at 7-21, 37.

[10][11] ***435** Sylvia's second statement is hearsay: The declarant is unavailable at trial--because Crawford invoked the marital privilege--and the statement is being offered to prove the truth of the matter asserted. ER 801(c). The State contends that Sylvia's second statement is admissible under ER 804(b)(3), the hearsay exception for a declarant's statement against penal interest. A statement against penal interest is not considered a firmly rooted exception to the hearsay rule, however. *Whelchel,* 115 Wash.2d at 715, 801 P.2d 948. Therefore, "out-of-court statements from a nontestifying codefendant made against penal interests and which inculpate the defendant are admissible against the defendant only when they bear adequate indicia of reliability." *State v. St. Pierre,* 111 Wash.2d 105, 113, 759 P.2d 383 (1988) (citing *Anderson,* 107 Wash.2d at 750, 733 P.2d 517; *State v. Dictado,* 102 Wash.2d 277, 287-88, 687 P.2d 172 (1984)). Thus, we must determine whether the statement contains a sufficient indicia of reliability to satisfy the confrontation clause. *See Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[12] Before we determine whether the statement is sufficiently reliable to satisfy confrontation clause concerns, we must assess which portions of the statement were actually against Sylvia's penal interest. Only the portions of Sylvia's statement that are self-inculpatory will be admitted under the statement against interest exception to the hearsay rule. *See State v. Roberts,* 142 Wash.2d 471, 491-97, 14 P.3d 713 (2000); ER 804(b)(3). In *Roberts* this court adopted the Supreme Court's rejection of a "whole statement" approach to defendant declarations. 142 Wash.2d at 494, 14 P.3d 713 (adopting *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)). Therefore, even though self-exculpatory statements may be included within a statement that is generally inculpatory, only those portions that are actually self-inculpatory are admissible. *Id.* at 492-94, 14 P.3d 713.

A statement against interest, or self-inculpatory statement, is defined as:

***436** A statement which was *at the time of its making* so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.
ER 804(b)(3) (emphasis added).

[13] Crawford objected to the admission of Sylvia's statements that he was " 'infuriated,' " " 'past tipsy,' " and that he said Lee " 'deserves a ass whoopin.' " *Crawford,* 2001 WL 850119, at *7 n. 3 (Armstrong, C.J., dissenting). He also objected to the admission of Sylvia's statement regarding whether Lee reached for or possessed a weapon when Michael assaulted him because it allegedly rebutted his own testimony and damaged his self-defense claim.

While potentially damaging to Michael, these statements are all inculpatory of Sylvia as well. It was Sylvia who showed Michael where to find Lee and she was present through the duration of the violent encounter. She walked away from the stabbing with Michael and did not turn to the police when she had the opportunity. As a potential accomplice, [FN5] therefore, Sylvia would benefit from limiting Michael's involvement; the lesser his charge, the lesser her accomplice liability. Sylvia's statements that Michael was "infuriated," "past tipsy," and that he ****663** said Lee "deserves a ass whoopin" would not shift blame from her to Michael, but rather it could increase Michael's culpability, and potentially hers as well. Furthermore, if Sylvia knew that Michael wanted to give Lee an "ass whoopin" and took Michael to find Lee, this fact could support a charge against Sylvia for accomplice liability because she could be viewed as encouraging or aiding the facilitation of a crime. *See* RCW 9A.08.020(3)(a). Likewise, Sylvia's assertion that Lee ***437** may have reached into his pocket, possibly for a weapon, but had empty hands when Michael stabbed him, would be against her interest. Rather, she would benefit her own case if she had said that Lee wielded a weapon throughout the confrontation and that Michael was merely protecting himself. Therefore, we conclude that these statements were self-inculpatory and admissible hearsay, provided they meet a sufficient indicia of reliability.

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FN5. An accomplice is someone who with knowledge that it will promote or facilitate the commission of a crime either (1) solicits, commands, encourages, or requests such other person to commit the crime or (2) aids or agrees to aid the other person in planning or committing the crime. RCW 9A.08.020(3)(a).

[14][15] Because a codefendant's confession is presumed unreliable, [FN6] the statement must either meet a firmly rooted exception to the hearsay rule [FN7] or provide some indicia of reliability, such as interlocking with the defendant's own confession. *St. Pierre,* 111 Wash.2d at 112-13, 759 P.2d 383. The State asserts that Sylvia's second statement is admissible as an interlocking confession with Michael's second statement. *See generally Rice,* 120 Wash.2d 549, 844 P.2d 416 (adopting *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986)). As this court recognized in *Rice,* "[w]hen a codefendant's confession is virtually identical [i.e., interlocks] to that of a defendant, it may be deemed reliable." *Id.* at 570, 844 P.2d 416 (citing *Lee,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514). Hence an interlocking confession will serve the same purpose as the nine-factor test in assessing reliability. *Id.*

FN6. Although Sylvia is not a codefendant, as she has not been formally charged with a crime, her role is similar to that of a codefendant. She was present during the assault, was arrested and gave a statement to the police concerning the events, and had an arguable motive to shift the blame away from herself. Her role in this case thus suggests applying the *Rice* interlocking confession analysis by analogy.

FN7. As previously noted, a statement against penal interest is not a firmly rooted hearsay exception for purposes of the confrontation clause.

[16] The Court of Appeals here held that, although the Crawfords' statements were "very similar," they differed regarding whether Lee was armed when Michael stabbed him. *Crawford,* 2001 WL 850119, at *6. Following are the two statements for comparison.

Sylvia's statement:
Q: did Kenny do anything to fight back from this assault
***438** A: (pausing) I know he reached into his pocket ... or somethin' ... I don't know what
Q: after he was stabbed
A: he saw Michael coming up. He lifted his hand ... his chest open, he might of went to go strike his hand out or something and then (inaudible)
Q: okay, you, you gotta speak up
A: okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him ... then his hands were like ... how do you explain this ... open arms ... with his hands open and he fell down ... and we ran (describing subject holding hands open, palms toward assailant)
Q: okay, when he's standing there with his open hands you're talking about Kenny, correct
A: yeah, after, after the fact, yes
Q: did you see anything in his hands at that point
A: (pausing) um um (no)
Ex. 42, at 6-7.

Michael's statement:
Q: okay. Did you ever see anything in [Lee's] hands
A: I think so, but I'm not positive
Q: okay, when you think so, what do you mean by that
A: I coulda swore I seen him goin' for somethin' before, right before everything ****664** happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.
Ex. 44, at 7.

Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear ***439** to overlap. The Court of Appeals stated that Sylvia's version of the story had Lee grabbing for something only after he had been stabbed, while Michael stated that Lee may have had something in his hand before the attack. *Crawford,* 2001 WL 850119, at *6. However, when asked whether Lee fought back from the assault, Sylvia states that Lee "lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right

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hand in his right pocket ... took a step back ... Michael proceeded to stab him...." Ex. 42, at 7. She also previously stated that she was unsure how Michael received the cut on his hand. *Id.* at 6. Thus, it is unclear from Sylvia's statement when, if ever, Lee possessed a weapon.

Michael's statement is equally ambiguous. He states, "I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive." Ex. 44, at 7. Thus, both of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.

Self-defense is at issue in this case, so admittedly the timing of Lee's possession of a weapon is significant. However, both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon. The interlocking confession rule is designed to admit "virtually identical" statements. *Rice,* 120 Wash.2d at 570, 844 P.2d 416. As the dissent from the Court of Appeals noted, and we agree, "neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." *Crawford,* *440 *2001 WL 850119, at * 7 (Armstrong, C.J., dissenting). Because Sylvia's and Michael's statements are virtually identical, admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause.*

CONCLUSION

We hold that a defendant does not waive his Sixth Amendment right to confront an adverse witness when he invokes the marital privilege to keep his wife from testifying at trial. Thus, Michael Crawford did not waive his confrontation clause rights when he invoked RCW 5.60.060 and refused to call his wife, Sylvia, to testify at his trial. Sylvia's pretrial statements to the police, at issue in this case, were admissible, however, because they were self- inculpatory and they interlocked with Michaels' own admissible statements.

We reverse the Court of Appeals and reinstate the conviction.

ALEXANDER, C.J., SMITH, JOHNSON, MADSEN, SANDERS, IRELAND, CHAMBERS and OWENS, JJ., concur.

54 P.3d 656, 147 Wash.2d 424

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NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Michael CRAWFORD, Appellant.

No. 25307-1-II.

July 30, 2001.

Appeal from Superior Court of Thurston County, Docket No. 99-1-01205-8, judgment or order under review, date filed 11/19/1999; Richard A. Strophy, Judge.

Thomas E. Doyle, Attorney At Law, Hansville, WA, for appellant(s).

Steven C. Sherman, Thurston Co Pros Office, Olympia, WA, for respondent(s).

UNPUBLISHED OPINION

BRIDGEWATER.

BRIDGEWATER.

*1 Michael Crawford appeals his conviction of first degree assault while armed with a deadly weapon. We reverse.

FACTS

On August 5, 1999, defendant Michael D. Crawford stabbed Rubin Richard Kenneth Lee at Lee's home. Police apprehended Michael that evening and he gave two taped statements. His wife, Sylvia Crawford, was with him during the stabbing; she also gave police two taped statements.

The Crawfords' first taped statements contained roughly similar stories. The Crawfords stated that they knew Lee and that they went to visit him at his apartment the day of the stabbing. Michael left briefly to go to a nearby store. Lee then made sexual advances toward Sylvia, which she fought off. Michael returned and heard his wife yelling. Michael and Lee started to fight and Lee was stabbed. The Crawfords quickly left.

The police separately questioned the Crawfords a second time several hours later. Again their statements were roughly similar, but the stories changed from the first version. They each stated that the alleged sexual assault by Lee against Sylvia had actually occurred several weeks earlier.

On the day of the stabbing, the Crawfords were visiting with friends when someone mentioned Lee. Michael became angry and he and Sylvia went to find Lee. They went to several bars looking for Lee before going to his apartment. They knocked at the wrong apartment, but Lee opened his door. The three talked for a short time and then Michael stabbed Lee. The difference in the second statements is that in Michael's second statement he says that Lee may have had something in his hand when he stabbed Lee, but in Sylvia's second statement, she says that Lee may have grabbed for something later, after Michael stabbed him.

The trial judge admitted both of Sylvia's statements after Michael invoked the marital privilege to prevent her from testifying.

The jury convicted Michael of first degree assault while armed with a deadly weapon.

ANALYSIS

I. Waiver of the Confrontation Right

The State, citing *State v. Salazar,* 59 Wn.App. 202, 217, 796 P.2d 773 (1990), argues that Michael waived his right to confrontation by not allowing Sylvia to testify. The marital privilege statute, RCW 5.60.060(1), states that a wife shall not be examined for or against her husband without her husband's consent. The State argues that Michael could have allowed Sylvia to testify, and by not doing so, he waived his right to confrontation. We disagree.

The Salazar Court held that a defendant who fails to call an available hearsay declarant waives a confrontation clause objection to the hearsay statement. We question this result. But even if we accept Salazar's reasoning, the issue here is different. In Salazar, the defendant had no right to prevent the witness from testifying. Here, Michael had a statutory right to keep his wife from testifying

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against him. And the State cites no authority to support the notion that a defendant waives his or her constitutional right to confront an adverse witness by invoking another right to keep the witness from testifying. Moreover, the argument runs counter to the rationale of *State v. Burden*, 120 Wn.2d 371, 378, 841 P.2d 758 (1992), where the court held that marital privilege does not bar third-person testimony of the defendant's wife's hearsay statements, but the statements 'must still meet other requirements for admissibility.' If a defendant waives a confrontation clause challenge by invoking the marital privilege, there would be no other requirements to meet. Furthermore, in other settings, we have not required a defendant to waive one right to preserve another. See *State v. Michielli*, 132 Wn.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of a case where defendant was forced to choose between waiving the right to a speedy trial or the right to effective assistance of counsel); *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (stating that forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant). Forcing Michael to relinquish the marital privilege to preserve his right to confrontation would render the marital privilege meaningless. We decline to do so.

II. Admissibility of Sylvia's Out-of-Court Statements

A. Standard of Review

*2 We use a three-step analysis to review the trial court's decision to admit Sylvia's statements. 'First, we must determine whether the statements are admissible under our Rules of Evidence. Second, we consider whether additional indicia of reliability satisfy the requirements of the confrontation clause. Finally, even if a statement fails to meet these requirements, we consider whether or not the error was harmless.' *State v. Rice*, 120 Wn.2d 549, 564, 844 P.2d 416 (1993).

B. Admissibility of Sylvia's Statements

Michael argues that Sylvia's out-of-court statements to the police were inadmissible under the confrontation clause of the Sixth Amendment and ER 804(b)(3). The confrontation clause gives a defendant the right to 'be confronted with the witnesses against him .' U.S. Const. amend. 6. Hearsay evidence does not offend the confrontation clause if the hearsay statement bears 'adequate indicia of reliability.' *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). A statement bears adequate indicia of reliability if it (1) falls within a firmly rooted hearsay exception or (2) contains 'particularized guarantees of trustworthiness.' Roberts, 448 U.S. at 66. ER 804(b)(3)--the hearsay exception for statements against the declarant's penal interest--is not considered a firmly rooted hearsay exception. *State v. Whelchel*, 115 Wn.2d 708, 715, 801 P.2d 948 (1990).

But evidence that satisfies the third prong of ER 804(b)(3) also satisfies the confrontation clause requirement of 'indicia of reliability.' ER 804(b)(3) allows the court to admit a hearsay statement against penal interest if (1) the declarant is unavailable at trial; (2) the statement tends to subject the declarant to criminal liability such that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. ER 804(b)(3). The corroboration requirement under ER 804(b)(3) 'arguably mirrors' the trustworthiness requirement under the confrontation clause. *Whelchel*, 115 Wn.2d at 716. Thus, a corroborated inculpatory statement that is admissible under ER 804(b)(3) satisfies the confrontation clause as well. *Whelchel*, 115 Wn.2d at 716-17.

1. The First Statement

Sylvia made two statements to the police. The State correctly points out that Sylvia's first statement is not hearsay because it was not used to prove the truth of the matter asserted. Rather, it was used to show that the Crawfords initially lied about the circumstances that led up to the stabbing. Confrontation and hearsay problems arise only when the out-of-court statement is offered to prove the truth of the matter asserted. *State v. Parris*, 98 Wn.2d 140, 145, 654 P.2d 77 (1982). Thus, Sylvia's first statement is not objectionable under the confrontation clause or ER 804(b)(3). However, it is admissible only if it is relevant under ER 401, and it is relevant only if the second statement is admitted, because the second statement impeaches the first by its supposed truthfulness. Thus, if the second statement is not admitted, then the first statement is not relevant and not admissible.

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2. The Second Statement

*3 Because Sylvia's second statement is hearsay, the ER 804(b)(3) analysis is necessary. The rule's first requirement--that the declarant be unavailable--is met. ER 804(a) defines 'unavailability' to include a witness who is exempt from testifying because of privilege. Here, the parties agreed that Sylvia was unavailable to testify pursuant to the marital privilege statute, RCW 5.60.010(a).

The second requirement of ER 804(b)(3) is that the declarant's statement be against his or her penal interest. Washington courts have analyzed this requirement in the context of accomplices' or co-defendants' hearsay statements. See, e.g., *Whelchel*, 115 Wn.2d 708; *State v. St. Pierre*, 111 Wn.2d 105, 117-18, 759 P.2d 383 (1988). The question is whether the overall circumstances surrounding the statement tend to make it self-serving or disserving. *Whelchel*, 115 Wn.2d at 721. Relevant factors may include a declarant's motive to curry favor with the authorities; whether the declarant gave the statement spontaneously and freely or under potentially coercive conditions; whether the declarant sought to avoid culpability, sought revenge against the defendant, or was afraid of the defendant; and whether the declarant sought a plea bargain. *Whelchel*, 115 Wn.2d at 717-22.

The trial court concluded that Sylvia's second statement, as a whole, was against her penal interest. Although it was Michael's idea to go find Lee, Sylvia admitted that she agreed to accompany him. She admitted that she showed Michael where Lee lived so that Michael could confront him. She also admitted that she thought the stabbing was 'justified' and did not call the police afterward. These admissions could give rise to accomplice liability for Sylvia. There is no indication that Sylvia was coerced--the detective read Sylvia her Miranda [FN1] rights, and she waived them. There is also no suggestion of plea-bargaining. Instead of trying to foist blame onto Michael, Sylvia hedged about how Lee was stabbed and whose knife was used to stab him. She also backtracked about how angry Michael was when he found out about Lee's sexual advances. Finally, she defended Michael to the police, saying, '{H}e's one of the most fair people you'll ever meet' and that he was her 'best friend.' Ex. 42 at 8. Considering this evidence, the trial court concluded that Sylvia's apparent motive in talking to the police was to help Michael.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

We hold that the trial court was correct that parts of Sylvia's statement were against her penal interest. But parts of her statement were not against her penal interest. Sylvia described Michael as 'infuriated,' 'enraged,' and 'past tipsy,' and she stated that Michael said Lee 'deserves a ass whoopin'.' Ex. 42 at 4. These statements, argues Michael, tend to exculpate Sylvia while incriminating him. We agree.

The U.S. Supreme Court considered the same argument in *Williamson v. U.S.*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). The District Court had ruled below that an accomplice's confession was admissible against the defendant under Fed.R.Evid. 804(b)(3). *Williamson*, 512 U.S. at 597. Parts of the confession were self-inculpatory, but other parts were not. *Williamson*, 512 U.S. at 604. After analyzing the text and the principle behind Rule 804(b)(3), the Supreme Court held that it was improper to admit the entire confession. *Williamson*, 512 U.S. at 604. The Court remanded the case for a determination of which parts of the confession were truly self- inculpatory. *Williamson*, 512 U.S. at 604. Our Supreme Court followed *Williamson* in *State v. Roberts*, 142 Wn.2d 471, 499, 14 P.3d 713 (2000), where it held that parts of the non-testifying co-defendant's confession were both against his interest and reliable. Thus, the Roberts court sent the case back to redact the non-testifying co-defendant's statement to allow in evidence only those portions that were against his interest and reliable.

*4 Similarly, parts of Sylvia's statement were not against her penal interest. Thus, the statement-against-penal-interest exception does not apply to these parts, and they are inadmissible unless some other hearsay exception applies. The State argues that these self-exculpatory parts are admissible under ER 803(a)(3), the state-of-mind exception. This exception allows into evidence hearsay statements of 'the declarant's then existing state of mind, emotion, sensation or physical condition.' But this exception is not applicable here. The declarant is Sylvia; when she said that Michael was 'infuriated,' 'enraged,' and 'past tipsy,' she was describing Michael's state of mind, not her own. Even if the exception applied to Michael's

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declaration that Lee 'deserves a ass whoopin',' there remains an additional level of hearsay (Sylvia's repeating that statement) that would exclude it. Hearsay within hearsay is inadmissible unless a hearsay exception applies to each statement. ER 805. Thus, because no hearsay exception applies to the self-exculpatory parts of Sylvia's statement, it was error to admit them.

Now we turn to whether Sylvia's redacted statements, i.e., those that were against her penal interest, were reliable. Washington courts use a nine-part test to determine whether an out-of-court statement satisfies the reliability prong of ER 804(b)(3) and the confrontation clause. This nine-part test examines factors that show particularized guaranties of the statement's trustworthiness. *Whelchel,* 115 Wn.2d at 722-25. Not all of the factors need to be present for the statement to be admissible. *State v. Anderson,* 107 Wn.2d 745, 753, 733 P.2d 517 (1987).

The first guideline is whether the declarant had an apparent motive to lie. As noted above, Sylvia's apparent motive was to help Michael. In fact, she admitted that her first statement was in part a lie. And although her statement did not resemble the unequivocal blame-shifting apparent in many accomplice confessions, it also does not show a motive to be truthful.

The second guideline is whether the declarant's general character suggests trustworthiness. Sylvia gave the police two versions of her statement within four hours of each other. This does not suggest trustworthiness.

As in *Whelchel,* the third guideline--whether more than one person heard the statement--is irrelevant here since the police taped Sylvia's statement. See *Whelchel,* 115 Wn.2d at 722.

The fourth guideline is whether the declarant made the statement spontaneously. The *Whelchel* court found that a voluntary and spontaneous statement suggested more trustworthiness than specific answers to specific questions. *Whelchel,* 115 Wn.2d at 723. Here Sylvia made her statement during police questioning, so the format necessarily consisted of answers to specific questions. Parts of her statement consisted of narrative, but they were not 'spontaneous' or 'voluntary' in the sense that she offered unsolicited information to the police. She was responding to questions such as '{W}hat happened between you and Kenny the first time{?}' Ex. 42 at 3, or 'How did you end up back over there today?' Ex. 42 at 4. But when answering questions that would incriminate Michael, Sylvia was evasive, hedging, or hesitant to respond. Overall, Sylvia's statements do not show the spontaneity that suggests reliability.

***5** The fifth guideline is whether the timing of the statements and the relationship between the declarant and the witness suggests trustworthiness. Statements to friends may be more trustworthy than statements to police. *Whelchel,* 115 Wn.2d at 723. Although one court found reliable a statement made to police immediately after the event in question, the court also noted that the declarant made the statement 'without any attempt to fabricate a response.' *State v. Rivas,* 49 Wn.App. 677, 688, 746 P.2d 312 (1987). Since Sylvia had already fabricated one response to police and was evasive in parts of her statement, this factor also suggests untrustworthiness.

Guideline six is whether Sylvia's statement contained express assertions of past fact. Her statement is mostly express assertions of past fact. Thus, it did not carry on its face a warning against giving it undue weight. *Whelchel,* 115 Wn.2d at 724. This weighs against admitting the statement.

The seventh guideline is whether cross-examination could help to show the declarant's lack of knowledge. This factor tends to support a finding of trustworthiness. There is no dispute that Sylvia was present before, during, and after the stabbing. But Sylvia stated that she shut her eyes during the stabbing. Cross-examination could show that she did not see Lee attack Michael because of this. We conclude that cross-examination could reveal that she lacked knowledge of what happened.

Guideline eight is the possibility that Sylvia's recollection was faulty because the event was remote. This factor suggests trustworthiness. Sylvia gave her statement the same day of the stabbing, so there is little chance that the events faded in her memory. And although she admits that she had been drinking that day, a breathalyzer test administered by the police indicated a blood alcohol content of .000. Thus, it is unlikely that Sylvia's recollection was faulty.

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The final guideline is whether the circumstances surrounding the statement suggest that the declarant misrepresented the defendant's involvement. Sylvia arguably may have tried to misrepresent Michael's involvement in the stabbing, but as we have discussed, she apparently was trying to help him, not implicate him. The fact that Sylvia initially lied to police does suggest untrustworthiness under this guideline (as well as guideline two). And to the extent that Michael's two inconsistent statements to the police constitute 'circumstances surrounding' Sylvia's statement, they also indicate untrustworthiness.

Overall, the nine-factor test fails to demonstrate that Sylvia's statement to the police was sufficiently reliable to satisfy the third prong of ER 804(b)(3) and the confrontation clause. But the State contends that Michael's confession shows the reliability of Sylvia's statement. Ordinarily, it is inappropriate to look at other evidence to establish a hearsay statement's reliability. *Whelchel,* 115 Wn.2d at 725. But in *State v. Rice,* 120 Wn.2d at 570, our Supreme Court found an accomplice's confession reliable after comparing it to another confession. The Court held that the accomplice's confession in a letter to his girlfriend was reliable and therefore properly admitted against the defendant. But the Court found the same accomplice's confession to police unreliable based on the nine-factor test. Nonetheless, the Court held that the similarity between the two confessions made the police confession reliable and rendered any error in admitting the police confession harmless. In holding that the similarity made reliable an otherwise unreliable confession, the Court relied on *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), for the rule that '{w}hen a codefendant's confession is virtually identical to that of a defendant, it may be deemed reliable as an 'interlocking' confession.' *Rice,* 120 Wn.2d at 570.

***6** But that reasoning does not apply in this case. Although the Crawfords' second statements to the police were very similar--on the day of the stabbing, they were hanging out drinking; someone mentioned Lee; Michael got angry; he and Sylvia set out looking for Lee; they went to several bars and finally Lee's apartment; they initially knocked on the wrong door; Lee came out; the three of them chatted for a few minutes; Michael stabbed Lee; and the Crawfords ran away--the stories differ regarding whether Lee was armed when Michael stabbed him. Michael's second version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia's version has Lee grabbing for something only after he has been stabbed. [FN2] The dissimilarity of these statements does not satisfy the reliability requirement of the confrontation clause and ER 804(b)(3).

FN2. Sylvia's statement:
Q: Did Kenny do anything to fight back from this assault?
A: (pausing) I know he reached into his pocket ... or somethin' ... I don't know what.
Q: After he was stabbed.
A: He saw Michael coming up. He lifted his hand ... his chest open, he might of {sic} went to go strike his hand out or something and then (inaudible).
Q: Okay, you, you gotta speak up.
A: Okay he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him ... then his hands were like ... how do you explain this ... open arms ... with his hands open and he fell down ... and we ran (describing subject holding hands open, palms toward assailant).
Q: Okay, when he's standing there with his open hands you're talking about Kenny, correct.
A: Yeah, after, after the fact, yes.
Q: Did you see anything in his hands at that point?
A: (pausing) um um (no).
Ex. 42 at 6-7.
Michael's statement:
Q: Okay. Did you ever see anything in {Lee's} hands?
A: I think so, but I'm not positive.
Q: Okay, when you think so, what do you mean by that?
A: I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later. Ex. 44 at 7.

The tests in *Whelchel* and *Rice* are designed to admit evidence that is reliable. They are not designed to elicit impeaching evidence, but to get to

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the truth of what occurred. In this case, Michael's and Sylvia's second statements are similar, but Sylvia's statement was plainly untrustworthy under the *Whelchel* and *Rice* tests. Thus, it was error to admit it. And because Sylvia's second statement is inadmissible, her first statement is also inadmissible.

And admitting Sylvia's statements was not harmless. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that a reasonable jury would reach the same verdict had the error not occurred. *State v. Easter,* 130 Wn .2d 228, 242, 922 P.2d 1285 (1996). Here, Sylvia's second statement refutes Michael's claim of self-defense, because Sylvia said that Lee may have reached in his pocket after Michael stabbed him. And the State wanted to admit the second statement not to show that Sylvia's statements were the 'truth,' but to show that Michael is a person who lies and would get the person closest to him, Sylvia, to lie in the first statement. The overwhelming message is that the jury cannot trust Michael's story. There is a reasonable doubt that the jury would have reached the same verdict in the absence of Sylvia's statements; thus, admitting the statements was reversible error.

3. *Lilly v. Virginia*

Crawford argues that the U.S. Supreme Court's decision in *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), requires exclusion of Sylvia's out-of-court statements. In *Lilly,* the Court determined that the admission of a non-testifying accomplice's confession violated the defendant's Sixth Amendment right of confrontation. *Lilly,* 527 U.S. at 139. The Virginia court had admitted the confession on the ground that it satisfied Virginia's statement against penal interest exception to the hearsay rule. *Lilly,* 527 U.S. at 122. A plurality of four justices found that accomplices' confessions are not within a firmly rooted exception to the confrontation clause. *Lilly,* 527 U.S. at 134. Turning then to the 'residual trustworthiness test' of the confrontation clause--whether the statement has 'particularized guarantees of trustworthiness'--the plurality was unconvinced that the accomplice's confession was sufficiently reliable to be admitted without opportunity for cross-examination. *Lilly,* 527 U.S. at 137-38.

*7 *Lilly* is on point in this case. In *Lilly,* the disputed statement did not fall under a firmly rooted hearsay exception, nor did it meet the Sixth Amendment's 'residual trustworthiness test.' Here, neither of Sylvia's statements survives a confrontation clause challenge under the Sixth Amendment's 'residual trustworthiness test' or under a firmly rooted hearsay exception. Thus, *Lilly* requires exclusion of both Sylvia's statements.

Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

HOUGHTON, J., concurs.

ARMSTRONG, C.J. (dissenting).

I agree with the majority that the court erred in admitting those parts of Sylvia's statement that were not inculpatory. [FN3] But I disagree with the majority's conclusion that no part of Sylvia's second statement is admissible. Because Sylvia's second statement is the same as Michael's second statement in all important aspects, I believe the trial court properly admitted her statement as an interlocking confession under *State v. Rice,* 120 Wn.2d 549, 844 P.2d 416 (1993).

FN3. But it was harmless error. Michael objects to Sylvia's statements that he was 'infuriated,' 'enraged,' and 'past tipsy,' and that he said Lee 'deserves a ass whoopin'.' Ex. 42 at 4. The jury heard a tape of Michael's own statements to police in which he said he wanted to 'kick { (Lee's} ass,' and that on the day of the stabbing he was 'mad, mad ... mad enough to go find {Lee}.' Ex. 44 at 3. Thus, the jury would have reached its same verdict even if the trial court had excluded the non-inculpatory parts of Sylvia's statement; admitting them was harmless error.

The majority finds that Sylvia's and Michael's second statements differ in whether the victim, Lee, reached for something before or after Michael stabbed him. I disagree. Both said that Lee may have reached for something before or during the stabbing. Sylvia said Lee put his hand over his head, 'put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him....' Ex. 42 at 7. Michael said, 'I could a swore I seen him goin' for

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somethin' before, right before everything happened.' Ex. 44 at 7. Thus, the statements, although vague, are essentially the same on the critical question of whether Michael acted in self-defense. Moreover, neither Michael nor Sylvia mentioned Lee reaching for something until police raised the possibility that Lee was armed. Michael's statement is reliable because he was motivated to put the best light possible on his conduct. And Sylvia's statement is reliable because she too was motivated to put the best light possible on Michael's conduct. Yet neither could offer more than that the victim may have reached for something immediately before the stabbing.

Whether or not Lee was armed is certainly critical to Michael's claim of self- defense. But any dissimilarity in the Crawfords' statements regarding Lee being armed is minor. The majority confuses these two considerations and wrongly concludes that because the statements are slightly dissimilar on a critical issue, there is a critical difference between the statements. I disagree.

Moreover, even if we read Sylvia's statement as reporting that Lee reached for something after the stabbing, the statements are still the same in one essential fact: neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable.

*8 In conclusion, I would hold Sylvia's statement was properly admitted because it interlocks with Michael's statement.

107 Wash.App. 1025, 2001 WL 850119 (Wash.App. Div. 2)

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THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL D. CRAWFORD,

Respondent.

NO. 71683-8

ORDER DENYING MOTION FOR RECONSIDERATION

FILED
SUPREME COURT
STATE OF WASHINGTON
2002 DEC 12 P 2:08
BRUCE MERRITT
CLERK

The Court having considered the Respondent's Motion for Reconsideration

Now, therefore, it is hereby

ORDERED:

That the Respondent's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 12th day of December 2002.

For the Court

CHIEF JUSTICE

147 Wn.2d 424

433/197

No. 02-____

**IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA**

MAR 10 2003

MICHAEL D. CRAWFORD,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Washington

CERTIFICATE OF SERVICE

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ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2003, I served counsel of record with a true and correct copy of the following documents:

1. Motion to Proceed In Forma Pauperis;
2. Petition for A Writ of Certiorari; and
3. Certificate of Service

by causing the same to be delivered via Federal Express as follows:

Steven C. Sherman
Thurston County Deputy Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502

I further certify that all parties required to be served have been served.

Bruce E.H. Johnson

02-9410

No. 02-____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

MAR 10 2003

MICHAEL D. CRAWFORD,

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STATE OF WASHINGTON,

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On Petition for a Writ of Certiorari
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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Michael D. Crawford, through undersigned counsel, asks leave of this Court to file the attached petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner is incarcerated. He earns only $55 per month and has no other access to funds. In state courts, Petitioner had a public defender at trial and appointed counsel on appeal, both of which were paid for entirely by the state, pursuant to Article 1 §22 of the Washington State Constitution, Wash. Sup. Ct. Cr. R. 3.1, and Wash. Rev. Code §10.73.150. Petitioner's declaration in support of this motion is attached hereto.

Respectfully submitted,

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02 - 410

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Michael D. Crawford, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 0	$ N/A	$ 0	$
Income from real property (such as rental income)	$ 0	$ N/A	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify): Prison Employment	$ 55	$	$ 0	$
Total monthly income:	$ 55	$	$ 0	$

MAR 10 2003

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model N/A
Value

☐ Motor Vehicle #2
Year, make & model N/A
Value

☐ Other assets
Description N/A
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N/A	$
Home maintenance (repairs and upkeep)	$ N/A	$
Food	$ N/A	$
Clothing	$ N/A	$
Laundry and dry-cleaning	$ N/A	$
Medical and dental expenses	$ N/A	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$
Life	$	$
Health	$	$
Motor Vehicle	$	$
Other:	$	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$	$
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$	$
Department store(s)	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify):	$	$
Total monthly expenses:	$	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am incarcerated at Stafford Creek Correctional Center, WA. I am not in contact with my wife and I do not know what income (if any) she has.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 28, 2003

At: Aberdeen, WA

Marshall Crawford

(Signature)